

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JOHN KIRSCHBAUM,

Petitioner,

vs.

D. W. NEVEN, et al.,

Respondents.

Case No. 2:12-cv-01007-APG-PAL

ORDER

Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#5) and respondents' answer (#8). The court finds that relief is not warranted, and the court denies the petition.

Pursuant to a plea agreement, petitioner was convicted of conspiracy to commit burglary, burglary while in possession of a firearm, conspiracy to commit kidnaping, first-degree kidnaping, attempted first-degree kidnaping, conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, and possession of a firearm by an ex felon. Ex. 38 (#9). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 43 (#9).

Petitioner then filed a post-conviction habeas corpus petition in the state district court. Ex. 44 (#9). The state district court denied the petition. Ex. 48 (#9). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 50 (#9).

Petitioner then commenced this action, and the answer followed.

Congress has limited the circumstances in which a federal court can grant relief to a petitioner who is in custody pursuant to a judgment of conviction of a state court.

1 An application for a writ of habeas corpus on behalf of a person in custody pursuant to the
2 judgment of a State court shall not be granted with respect to any claim that was adjudicated
on the merits in State court proceedings unless the adjudication of the claim—

3 (1) resulted in a decision that was contrary to, or involved an unreasonable application of,
4 clearly established Federal law, as determined by the Supreme Court of the United States; or

5 (2) resulted in a decision that was based on an unreasonable determination of the facts in
light of the evidence presented in the State court proceeding.

6 28 U.S.C. § 2254(d). “By its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the
7 merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” Harrington v.
8 Richter, 562 U.S. 86, 98 (2011).

9 Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown
10 that the earlier state court’s decision “was contrary to” federal law then clearly established
in the holdings of this Court, § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412 (2000); or
11 that it “involved an unreasonable application of” such law, § 2254(d)(1); or that it “was
based on an unreasonable determination of the facts” in light of the record before the state
12 court, § 2254(d)(2).

13 Richter, 562 U.S. at 100. “For purposes of § 2254(d)(1), ‘an unreasonable application of federal
14 law is different from an incorrect application of federal law.’” Id. (citation omitted). “A state
15 court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded
16 jurists could disagree’ on the correctness of the state court’s decision.” Id. (citation omitted).

17 [E]valuating whether a rule application was unreasonable requires considering the rule’s
18 specificity. The more general the rule, the more leeway courts have in reaching outcomes
in case-by-case determinations.

19 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

20 Under § 2254(d), a habeas court must determine what arguments or theories supported or, as
21 here, could have supported, the state court’s decision; and then it must ask whether it is
possible fairminded jurists could disagree that those arguments or theories are inconsistent
22 with the holding in a prior decision of this Court.

23 Richter, 562 U.S. at 102.

24 As a condition for obtaining habeas corpus from a federal court, a state prisoner must show
25 that the state court’s ruling on the claim being presented in federal court was so lacking in
justification that there was an error well understood and comprehended in existing law
beyond any possibility for fairminded disagreement.

26 Id. at 103.

27 The petition contains three grounds. Ground 1 is a claim that petitioner’s guilty plea was
28 involuntary and unknowing because petitioner was taking mental-health medication, which clouded

1 his judgment and had no effect upon the major depression that he was suffering at the time. Ground
 2 2 contains multiple claims of ineffective assistance of trial counsel and appellate counsel. Ground 3
 3 contains claims of cumulative error.

4 A petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense
 5 attorney's representation "fell below an objective standard of reasonableness," Strickland v.
 6 Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney's deficient performance prejudiced
 7 the defendant such that "there is a reasonable probability that, but for counsel's unprofessional
 8 errors, the result of the proceeding would have been different," id. at 694. "[T]here is no reason for
 9 a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to
 10 address both components of the inquiry if the defendant makes an insufficient showing on one." Id.
 11 at 697. A claim of ineffective assistance of appellate counsel is evaluated the same way that a claim
 12 of ineffective assistance of trial counsel is evaluated. Miller v. Keeney, 882 F.2d 1428, 1433-34
 13 (9th Cir. 1989).

14 The typical practice for this court is to evaluate the petition ground-by-ground. That would
 15 be inefficient in this case, because many of petitioner's grounds are repetitive with at most minor
 16 changes. The court would either be repeating itself or constantly referring back to other pages.
 17 Instead, the court will proceed through the Nevada Supreme Court's order in the habeas corpus
 18 appeal, paragraph by paragraph, and show how petitioner's current grounds for relief do not meet
 19 the standard required by 28 U.S.C. § 2254(d).¹

20 Starting with the claims of ineffective assistance of trial counsel, the Nevada Supreme Court
 21 held:

22 First, appellant claimed counsel was ineffective for failing to properly challenge the
 23 kidnapping charges [footnote 2: Appellant referred to "kidnapping charges" and thus
 24 appears to have been referring to the single count of kidnapping as well as the single count
 of attempted kidnapping.] as redundant and for failing to explain redundancy to appellant.

25
 26 ¹The court does not need to address the Nevada Supreme Court's order on direct appeal.
 27 Petitioner raised two claims on direct appeal, that his guilty plea was involuntary and unknowing,
 28 and that his sentence was excessive in violation of the Eighth Amendment. The Nevada Supreme
 Court told petitioner to raise the guilty-plea claim in a state habeas corpus petition, which petitioner
 did. The Nevada Supreme Court denied the Eighth Amendment claim, and petitioner has not raised
 it in the current federal habeas corpus petition.

1 Appellant failed to demonstrate prejudice. Appellant did not claim that but for counsel's
2 errors, he would not have pleaded guilty but would have insisted on going to trial. Further,
3 appellant received significant benefits in pleading guilty: The State dropped the deadly
4 weapon enhancements in two of the charges to which appellant pleaded, dismissed one of
5 appellant's three other pending felony cases, and agreed not to seek habitual criminal status
6 that could have carried penalties of life without the possibility of parole. We therefore
7 conclude that the district court did not err in denying these claims.

8 Ex. 50, at 2 (#9). The corresponding claim in the petition is ground 2(g). Based upon argument in
9 the sentencing memorandum, it appears that petitioner is arguing that the counts of kidnapping and
10 attempted kidnapping are redundant to the counts of robbery; petitioner argued in that memorandum
11 for concurrent sentences. Ex. 36, at 4 (#9). The sentencing memorandum is the first time that the
12 double-jeopardy issue arose in state-court proceedings.

13 In ground 2(g), petitioner also mentions that counsel did not challenge the deadly-weapon
14 enhancements and the validity of the kidnapping charges. These statements are not part of ground
15 2(g) itself; petitioner is referring to other grounds in the petition. The court has reviewed the state-
16 court record. Petitioner's guilty plea was part of a package deal that led to the dismissal of another
17 pending felony case. Ex. 30, at 2 (#9). The kidnapping and attempted kidnapping counts originally
18 were charged with the deadly-weapon enhancements. See Ex. 2 (#9). The deadly-weapon
19 enhancements were dropped, saving petitioner a couple of consecutive sentences. Finally, the
20 prosecution agreed not to seek an adjudication of petitioner as a habitual criminal, which carried a
21 possible sentence of life imprisonment without the eligibility for parole.

22 On the other hand, the argument that the robbery and kidnapping charges were the same was
23 weak. Petitioner and his co-defendant were charged with robbing a convenience store early in the
24 morning. The person who was working there testified before the grand jury that she walked over to
25 one of the robbers, who was posing as a customer, because the robber had asked a question about
26 the coffee service. The robber then showed her a gun, took her to the back room of the store, and
27 bound her with tape. Ex. 1 at 9-11 (#9). The clerk's boyfriend, who was an off-duty employee, was
28 asleep in the store's break room. The clerk called out "Fire!" He ran out of the break room. One of
the robbers hit him, tried to bind him with tape, but failed because not enough tape was left on the
roll. Id. at 23 (#9). When kidnapping is incidental to another offense—robbery, in this case—it is
necessary to prove either an increased risk of harm to the victim or an independent purpose or

1 significance. Doyle v. State, 921 P.2d 901, 910-11 (Nev. 1996), overruled on other grounds by
2 Kaczmarek v. State, 91 P.3d 16, 29 (Nev. 2004). In petitioner's case, he could have completed the
3 robbery simply by showing the clerk the gun and demanding that she hand over the money in the
4 cash register. Moving her to the back room and binding her was unnecessary to the completion of
5 the robbery. Petitioner has not shown that no fair-minded jurist could hold that either he would not
6 have pleaded guilty had counsel raised a double-jeopardy challenge earlier, or that he could have
7 received a better deal if that challenge was successful. Ground 2(g) is without merit.

8 Second, appellant claimed counsel was ineffective for failing to investigate, prior to entering
9 plea negotiations, appellant's mental state at the time he committed the crimes. Appellant
10 further claimed that had counsel done so, he would have discovered that appellant's
11 psychological conditions would have provided an insanity or incompetence defense or
12 resulted in convictions for lesser-included offenses. Appellant failed to demonstrate
13 deficiency or prejudice as he failed to support these claims with specific facts that, if true,
14 would have entitled him to relief. Incompetence is not a defense, and appellant did not
15 allege that he was "in a delusional state such that he [could not] know or understand the
16 nature and capacity of his act [] or . . . that the act [was] not authorized by law." Finger v.
17 State, 27 P.3d 66, 84-85 (2001). Further, not only did appellant fail to identify any lesser-
18 included offenses, but he did not explain how their existence would have affected his
19 decision to plead guilty in light of the substantial benefit he received in exchange for his
20 guilty plea. We therefore conclude that the district court did not err in denying these claims.

21 Ex. 50, at 2-3 (#9). The corresponding claims in the federal petition are grounds 2(b), 2(c), and
22 2(e). Respondents note correctly that under Nev. Rev. Stat. § 178.400, a person who is mentally
23 incompetent at the time of trial may not be tried, but incompetence is not a defense to the crime
24 itself. Insanity is a defense, and the Nevada Supreme Court quoted the definition of insanity. The
25 Nevada Supreme Court correctly noted that petitioner did not allege any facts indicating that he was
26 delusional at the time of the robbery. To the contrary, the victims at the robbery testified before the
27 grand jury that the robbers had put a sign on the door of the convenience store stating that the
28 store's computer was down and that the store was closed temporarily, that one of the robbers had
shouted to the other that things were not going well and that they needed to leave, and that the
robbers had brought many tools with them. The facts of the case would not have led a reasonable
counsel to suspect that petitioner was insane. Petitioner has not shown how any fair-minded jurist
could have held other than the Nevada Supreme Court held. Grounds 2(b), 2(c), and 2(e) are
without merit.

1 Third, appellant claimed counsel was ineffective for failing to ensure that appellant's guilty
 2 plea was entered into knowingly, voluntarily, and intelligently in light of appellant having
 3 been on psychotropic medications at the time. Appellant failed to demonstrate deficiency or
 4 prejudice as he failed to support this claim with specific facts that, if true, would have
 5 entitled him to relief. He did not state whether counsel was aware at the time of the guilty
 6 plea that appellant was medicated or that, if counsel was aware, appellant gave counsel any
 7 reason to believe that the medications would have affected his guilty plea. The mere fact
 8 that appellant was being medicated for mental health issues did not itself render his plea
 9 invalid. . . . Notably, appellant did not allege or demonstrate that he was incompetent to
 10 enter a guilty plea or, more specifically, that he did not understand the nature of the charges
 11 against him or that he was unable to assist counsel. . . . We therefore conclude that the
 12 district court did not err in denying this claim.

13 Ex. 50, at 4 (#9-7) (citations omitted). The corresponding claims in the federal petition are grounds
 14 1, 2(a), 2(d), 2(n), and 2(o). Respondents note correctly that even now petitioner does not allege
 15 that counsel knew that petitioner was on mental-health medication, let alone that the medications
 16 could have affected his ability to enter a plea. Respondents also note correctly that petitioner has
 17 not proven that he actually was on medication at the time. Petitioner did not mention medication at
 18 the plea colloquy. See Ex. 33 (#9). Petitioner did not mention his pre-sentencing letter to the court
 19 that he was on medication. See Ex. 36, internal Ex. H (#9). Petitioner did not say at sentencing that
 20 he was on mental-health medication; to the contrary, he said that he had been addicted to pain pills,
 21 then addicted to methadone, but that he cleared up his head in the 19 months he had been in jail.
 22 See Ex. 37, at 10 (#9). Petitioner affirmatively stated in the written plea agreement that he was not
 23 under the influence of a controlled substance or other drug that would impair his mind. See Ex. 30
 24 (#9). Under these circumstances, the Nevada Supreme Court reasonably applied Strickland.
 25 Grounds 1, 2(a), 2(d), 2(n), and 2(o) are without merit.

26 Fourth, appellant claimed counsel was ineffective for failing to lay a foundation for "the
 27 eyewitness expert's testimony" or to consult with the expert and for failing to consult with a
 28 fingerprint or DNA expert regarding a soda bottle that would have pointed to a third suspect
 in the crimes. Appellant failed to demonstrate deficiency or prejudice as he failed to support
 these claims with specific facts that, if true, would have entitled him to relief. Appellant did
 not identify the "eyewitness expert" or what his testimony would have been. Further,
 appellant did not explain how the expert or the existence of a third defendant would have
 affected his decision to enter a guilty plea. We therefore conclude that the district court did
 not err in denying these claims.

Ex. 50, at 4 (#9). The court has reviewed ground 1(e) of the state habeas corpus petition. Ex. 44, at
 12 (#9). The Nevada Supreme Court was correct in noting that petitioner did not identify the
 eyewitness expert or what the expert's testimony would be. The Nevada Supreme Court also was

1 correct in noting that petitioner did not explain how he would not have pleaded guilty if it was
2 established that there was a third robber. Consequently, the Nevada Supreme Court reasonably
3 applied Strickland. Ground 2(f), the corresponding claim in the federal habeas corpus petition, is
4 without merit.

5 Fifth, appellant claimed counsel was ineffective for failing to meaningfully test the deadly
6 weapon enhancements. Appellant failed to demonstrate deficiency or prejudice as he failed
7 to support this claim with specific facts that, if true, would have entitled him to relief. As
8 evidence of his claim, appellant pointed to a statement in his sentencing memorandum
9 asserting that the State would concede that some, if not all, of the guns used in the crime
spree were toys. Appellant, who was charged in three other temporally related cases
involving burglaries or robberies, some of which were armed, did not claim that the gun
used in the instant crimes was a toy gun. We therefore conclude that the district court did
not err in denying this claim.

10 Ex. 50, at 4-5 (#9). The corresponding claim in the federal petition is ground 2(i). Petitioner was a
11 defendant in four temporally related cases. Case C241679 is the subject matter of the current
12 federal petition. Cases C246440 and C246075A were the other two cases that were part of the
13 guilty plea agreement. Case 08F01586X, which was still in the justice court when petitioner agreed
14 to plead guilty, was dismissed under the agreement. In the prosecution's sentencing memorandum,
15 the prosecution stated that in case C246440, the victim saw that petitioner was simulating that he
16 had a gun concealed in a black duffel bag. Ex. 34, at 5 (#9). In that case, petitioner pleaded guilty
17 to burglary, first-degree kidnapping, and robbery without any deadly-weapon enhancements. The
18 prosecution made no other concessions in the sentencing memorandum. Furthermore, petitioner
19 admitted in the plea hearing in this case that he was using a gun. Ex. 33, at 11-14 (#9). The
20 Nevada Supreme Court reasonably applied Strickland. Ground 2(i) is without merit.

21 Sixth, appellant claimed counsel was ineffective for failing to prepare appellant or to present
22 any mitigation evidence at the sentencing hearing. Appellant failed to demonstrate
23 deficiency or prejudice. His claims that counsel did not prepare appellant or call any
24 witnesses were bare and naked as he did not say how counsel could have better prepared
25 him, what witnesses counsel should have called, or how any of the above would have
changed the outcome at sentencing. His remaining claims—that no mitigation evidence was
presented, that he received a sentence of twenty years to life, and that the alleged triggerman
received a lesser sentence—are repelled by the record. We therefore conclude that the
district court did not err in denying these claims.

26 Ex. 50, at 5 (#9). The court has reviewed grounds 1(i) and 1(j) in the state habeas corpus petition.
27 The Nevada Supreme Court noted correctly that petitioner did not allege how counsel should have
28 prepared petitioner or what witnesses counsel should have called. The Nevada Supreme Court's

1 holding that other claims were belied by the record also is correct. Counsel prepared a sentencing
 2 memorandum, in which he described petitioner's fall into drug addition and to which he attached a
 3 letter from petitioner himself. See Ex. 36 (#9). Counsel argued the same at the sentencing hearing.
 4 Ex. 37, at 5-8 (#9). Petitioner did not receive a single sentence of life imprisonment with eligibility
 5 for parole starting after twenty years. See Ex. 38 (#9). If petitioner must spend a minimum of
 6 twenty years in prison, then it is due to how the sentences in this case and the other criminal cases
 7 were structured. As for the sentence of his co-defendant, that person received similar sentences for
 8 similar crimes. See Ex. 35 (#9). If petitioner's ultimate time in prison is greater than the time his
 9 co-defendant will spend, then it is because petitioner was convicted of more crimes than his co-
 10 defendant was. The Nevada Supreme Court reasonably applied Strickland. Grounds 2(j) and 2(k),
 11 the corresponding claims in the federal petition, are without merit.

12 Seventh, appellant claimed counsel was ineffective for failing to object to a change in
 13 presiding judges between the change of plea and sentencing. Appellant failed to
 14 demonstrate deficiency or prejudice as his claim was belied by the record: The same judge
 took appellant's plea and sentenced him. We therefore conclude that the district court did
 not err in denying this claim.

15 Ex. 50, at 5 (#9). The Nevada Supreme Court is correct that the same judge took petitioner's plea
 16 and sentenced him. See Ex. 33, Ex. 37 (#9). The Nevada Supreme Court reasonably applied
 17 Strickland. Ground 2(l), the corresponding claim in the federal petition, is without merit.

18 Eighth, appellant claimed counsel was ineffective for failing to explain to him the post-
 19 judgment relief available, causing him to miss important filing deadlines. Appellant failed
 20 to demonstrate deficiency or prejudice. Notably, trial counsel withdrew and was replaced
 21 with a new, court-appointed appellate counsel prior to the deadline for filing a direct appeal.
 Moreover, appellant filed a timely direct appeal and post-conviction petition for a writ of
 habeas corpus and thus failed to demonstrate a reasonable probability of a different outcome
 had he known of the deadlines earlier. We therefore conclude that the district court did not
 err in denying this claim.

23 Ex. 50, at 5-6 (#9). The Nevada Supreme Court was correct; all of petitioner's proceedings in state
 24 court were filed on time.² The Nevada Supreme Court applied Strickland reasonably. Ground
 25 2(m), the corresponding claim in the federal petition, is without merit.

28 ²Petitioner also commenced this action on time.

1 The Nevada Supreme Court then turned to petitioner's claims of ineffective assistance of
2 appellate counsel.

3 First, appellant claimed that counsel was ineffective for improperly challenging his guilty
4 plea on direct appeal and for not advising him on the proper vehicle for doing so. Appellant
5 failed to demonstrate prejudice because the instant petition—in which petitioner has
6 challenged the validity of his guilty plea—was a proper vehicle. . . . We therefore conclude
7 that the district court did not err in denying this claim.

8 Ex. 50, at 6-7 (#9) (citations omitted). The Nevada Supreme Court ruled upon petitioner's
9 challenge to the validity of his guilty plea in the paragraph starting "Third," at pages 3-4 of that
10 same order, and thus petitioner did not suffer any prejudice. The Nevada Supreme Court applied
11 Strickland reasonably. Ground 2(p), the corresponding claim in the federal petition, is without
12 merit.

13 Second, appellant claimed that counsel was ineffective for failing to communicate with
14 appellant and seek his input during the appeal. Appellant failed to demonstrate prejudice as
15 he failed to support these claims with specific facts that, if true, would have entitled him to
16 relief. Appellant failed to state what additional claims counsel should have raised or how
17 additional communication would have led to a reasonable probability of success on appeal.
18 We therefore conclude that the district court did not err in denying these claims.

19 Ex. 50, at 7 (#9). Petitioner pleaded guilty, and that plea was a bar to any claim, under either state
20 law or federal law, that arose before the entry of the plea, other than a claim that the plea was
21 involuntary or unknowing. See Tollett v. Henderson, 411 U.S. 258, 267 (1973); Webb v. State, 91
22 Nev. 469 (1975). The direct appeal had two issues. First, petitioner challenged the validity of the
23 plea, which he should have raised, and later did raise, in a state habeas corpus petition. Second,
24 petitioner argued that his sentence was excessive in violation of the Eighth Amendment, and that
25 was not a claim barred by his guilty plea. The court has reviewed ground 2(g) of the state habeas
26 corpus petition, and petitioner did not allege what other grounds appellate counsel should have
27 raised other than the two that were raised. In ground 2(w) of the federal petition, which is the
28 corresponding claim, petitioner still does not allege what other grounds appellate counsel should
29 have raised. The Nevada Supreme Court applied Strickland reasonably, and ground 2(w) is without
30 merit.

31 Third, appellant claimed counsel was ineffective for failing to communicate with and advise
32 appellant after this court affirmed appellant's conviction on direct appeal. Specifically,
33 appellant claimed counsel failed to discuss with appellant the possibility of a petition for

1 rehearing or for en banc reconsideration, explain how the issuance of a remittitur from the
2 direct appeal would trigger State and federal habeas deadlines and what those deadlines
3 were, provide him with post-conviction legal forms, advise him of appellate claims that
4 were available but not raised and of possible ineffective-assistance claims, or provide him
5 with the trial and appellate records. Appellant failed to demonstrate deficiency or prejudice
6 as he failed to support these claims with specific facts that, if true, would have entitled him
7 to relief. Appellant failed to identify claims that he would have raised in a petition for
rehearing or for en banc reconsideration. Appellant also failed to identify what federal filing
deadlines he may have missed and, in light of his timely post-conviction habeas corpus
petition, how he was prejudiced by any lack of forms or records. Moreover, appellant failed
to demonstrate a reasonable probability of success had counsel acted in the manner appellant
suggested. We therefore conclude that the district court did not err in denying these claims.

8 Ex. 50, at 7-8 (#9). As noted above, petitioner filed both his state habeas corpus petition and his
9 federal habeas corpus petitions on time. He also used the correct forms. Regarding petitions for
10 rehearing or en banc reconsideration after the decision on direct appeal, petitioner raised only one
11 issue that was proper for direct appeal, that his sentence was excessive in violation of the Eighth
12 Amendment. Petitioner does not allege what was wrong with the Nevada Supreme Court's
13 decision, and he has not raised the issue itself in the federal habeas corpus petition. The Nevada
14 Supreme Court reasonably applied Strickland. Grounds 2(q), 2(r), 2(s), 2(t), 2(u), 2(v), 2(x), the
15 corresponding claims in the federal habeas corpus petition, are without merit.

16 Ground 3 contains two claims of cumulative error, one for the claims of ineffective
17 assistance of trial counsel and one for the claims of ineffective assistance of appellate counsel. In
18 ruling on the same issue, the Nevada Supreme Court held that even where petitioner had alleged
19 sufficient facts of deficient performance by counsel, petitioner did not allege any facts showing that
20 petitioner suffered prejudice. Ex. 50, at 6, 8 (#9). Based upon this court's analysis of the other
21 grounds, this was not an unreasonable application of clearly established federal law. Ground 3 is
22 without merit.

23 To appeal the denial of a petition for a writ of habeas corpus, Petitioner must obtain a
24 certificate of appealability, after making a "substantial showing of the denial of a constitutional
25 right." 28 U.S.C. §2253(c).

26 Where a district court has rejected the constitutional claims on the merits, the showing
27 required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that
28 reasonable jurists would find the district court's assessment of the constitutional claims
debatable or wrong.


1 Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also James v. Giles, 221 F.3d 1074, 1077-79 (9th
2 Cir. 2000). The court concludes that this standard is not met for any of petitioner's grounds for
3 relief, and the court denies a certificate of appealability.

4 Respondents ask the court to make a finding under Nev. Rev. Stat. § 209.451 that the
5 repetitive grounds and the untrue grounds in the petition were presented for an improper purpose,
6 thus making petitioner eligible for forfeiture of good-time credits. The court declines to make such
7 a finding. While petitioner did include grounds that were repetitive or untrue, the court sees little
8 distinction between petitioner's case and other pro se prisoners who do something similar. The
9 Nevada Supreme Court was able to place petitioner's claims into groups of related claims and deal
10 with them efficiently, and under 28 U.S.C. § 2254(d) this court's analysis followed a similar path.
11 Furthermore, it is unclear what effect this would have. Petitioner is serving a sentence of life
12 imprisonment with eligibility for parole after five years for first-degree kidnapping, and that is
13 consecutive to a sentence of life imprisonment. As this court understands Nevada law, the good-
14 time credits for that type of crime are applied to the maximum sentence. For a life sentence, the
15 credits have no effect upon the duration of the sentence.

16 IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus (#5) is
17 **DENIED**. The clerk of the court shall enter judgment accordingly.

18 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

19 Dated: August 4, 2015.

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22 _____
23 ANDREW P. GORDON
24 United States District Judge
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